No. 80-507

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NASIR and ROSALIE RAHIN,

Petitioners,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for a Writ of Certiorari to the Superior Court of the State of New Jersey, Appellate Division

RESPONDENT'S BRIEF IN OPPOSITION

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Counter-Statement of Question Presented

1. Whether the revocation of the subject recognizance of bail, complied with Petitioners' rights to due process of law when the criminal action defendant fled during his trial?

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Opinions Below

Reference is made to the Orders of the Supreme Court of New Jersey, Superior Court of New Jersey, Appellate Division and Superior Court of New Jersey, Law Division—Essex County, Petition-Appendix 1a-7a.

Counter-Statement of the Case

Petitioners, Nasir and Rosalie Rahin, as sureties, executed a recognizance of bail, supported by a $50,000 property bond on their home, to secure the release on bail of criminal defendant Frank Simmons, who had been indicted on six counts of conspiracy, armed robbery, kidnapping, threatening to take a life, extortion, and being armed. During his trial, at which defendant appeared, the prosecutor moved for revocation of bail on the basis of the testimony of a previously undisclosed witness, who had been under a protective order. The prosecutor represented that her testimony would be particularly damaging to defendant Simmons' case and also show that before trial he had tried to get her to perjure herself. He asked the court's permission to produce the witness to testify in support of revocation of defendant's bail. His theory was that because of this witness' damaging testimony, Simmons would attempt to leave the jurisdiction.

Since the production of the witness was a surprise to the defense, the trial judge granted a recess for defense counsel to review a previously undisclosed six-page statement given by the witness and to discuss it with Simmons. Although brought to the attention of the trial judge, he saw no need to order that defendant remain in the courtroom since he would be consulting with his attorney. During the recess while defense counsel was with defendant getting a refreshment in the hallway, defendant fled. A bench warrant was issued for his arrest and bail was forfeited. Trial continued in his absence and the defendant was found guilty of five of the six counts. The defendant is presently at large.

After the defendant fled, the petitioners' security was forfeited and a judgment against the petitioners' home was

entered. The petitioners' appeal from this forfeiture was denied by the Superior Court of New Jersey, Appellate Division by Order dated March 3, 1980, and Certification of that Order was denied by the New Jersey Supreme Court.

Reasons for Denying the Writ

1. Petitioners did not raise a substantial federal question in the state court below

The petitioners have failed to raise a substantial federal question below, and therefore, said question cannot be initially raised in their Petition. It has long been established that this Court will not decide federal constitutional issues raised for the first time before it on review of a state court decision. In *Crowell* v. *Randell*, 10 Pet. 368, 9 L.Ed. 458 (1836); *Cardinale* v. *Louisiana*, 394 U.S. 437, 22 L.Ed. 2d 398 (1969). The rationale in support of this holding is most logical and prevailing. Questions not raised below are those on which the record is very likely to be inadequate, since it was certainly not compiled with those types of issues in mind. In a federal system it is important that the state courts be given the first opportunity to consider the applicability of a state statute in light of a constitutional challenge, since the statutes may be construed in a way which saves the constitutionality. Therefore, this court lacks jurisdiction to entertain this matter and the petition should be denied.

2. Respondent complied with the provisions of the Fifth and Fourteenth Amendments

Petitioners contend that the actions of the respondent and trial judge at trial, without notice and without opportunity for the sureties to seek exoneration of their liability

by surrendering defendant Simmons, substantially increased the risk undertaken by them and thus there was a breach of the recognizance of bail contract. In essence they allege that the prosecutor's revelation that he had a witness particularly damaging to defendant's cause and motion to revoke bail, coupled with the trial judge's refusal to order that defendant remain in court, should relieve them of any liability under the recognizance of bail contract.

The purpose of bail is to secure the release of an accused from imprisonment pending disposition of the charge and to assure his presence in court when lawfully required in connection with that charge. *State* v. *Rice,* 137 N.J.Super. 593, 599 (Law Div. 1975), aff'd o.b. 148 N.J.Super. 145 (App. Div. 1977). In the present case the recognizance of bail contract, in accordance with New Jersey Court Rule 3:26-4(a), expressly provides that "the condition of this recognizance is such that if the said principal shall appear at all states of the proceedings until final determination of the cause, unless otherwise ordered by the court, then this recognizance to be void, otherwise to remain in full force and virtue". Generally, a final determination in a criminal case occurs only upon the dismissal on the merits, an acquittal, or upon sentence after conviction. *State* v. *Midland Ins. Co.,* 167 N.J.Super. 419, 422 (App. Div. 1979), certif. den. —— N.—. —— (1979); *State* v. *Rice,* above, 137 N.J.Super. at 601.

A surety may be exonerated from the recognizance and have his obligation terminated by timely surrender of the defendant into custody at any time upon securing a proper order from the court. New Jersey Court Rule 3:26-7 (1969); *State* v. *Rice,* above, 137 N.J.Super. at 604; *State* v. *Gonzalez,* 69 N.J.Super. 283, 289 (App. Div. 1961). However, unless such action is taken, a surety is responsible for supervising the defendant so that he appears when required

at any stage of the proceedings, *State* v. *Hyers*, 122 N.J. Super. 177, 180 (App. Div. 1973), or else run the risk of the forfeiture of bail.

In the instant case petitioners, as sureties, had the responsibility to see that defendant Simmons was present in court on each day of trial. The respondent and trial judge's actions here in prosecuting and trying defendant's case can in no way be held to relieve the sureties of this burden. It was their responsibility to be aware of any turn of events in the prosecution of defendant which might increase the risk he would flee to meet their contract obligation and protect their own interests. Therefore, petitioners' rights under due process of law was not violated and accordingly, the petition herein should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: October 21, 1980